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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

BANCO PANAMERICANO, INC., CHIPLEASE, INC., and LEON GREENBLATT,

Petitioners,

v.

CHASTANG LANDFILL, INC., WASTE MANAGEMENT HOLDINGS, INC., CONSORTIUM SERVICE MANAGEMENT GROUP, and JAY A. STEINBERG, CHAPTER 7 TRUSTEE FOR THE ESTATE OF RESOURCE TECHNOLOGY CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

GREGORY J. JORDAN
Counsel of Record
EVANGELOS J. GEGAS
PETER J. SCHMIDT
DYKEMA GOSSETT PLLC
10 South Wacker Drive
Suite 2300
Chicago, IL 60606
(312) 876-1700

Attorneys for Petitioners

200085

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

1. Is a lender with a security interest on all of a debtor's assets entitled to the protections of Section 363(f) of the United States Bankruptcy Code (11 U.S.C. § 363(f)) when a debtor-in-possession or bankruptcy trustee seeks authority from a bankruptcy court to sell such lender's collateral outside the ordinary course of business?

2. Can a debtor-in-possession or a bankruptcy trustee abandon an executory contract pursuant to Section 544 of the United States Bankruptcy Code (11 U.S.C. § 554)?

PARTIES TO THE PROCEEDING

Petitioners are Banco Panamericano, Inc., Chiplease, Inc., and Leon Greenblatt

Respondents are Chastang Landfill, Inc., Waste Management Holdings, Inc., Consortium Service Management Group, and Jay A. Steinberg, Chapter 7 Trustee for the Estate of Resource Technology Corporation.

STATEMENT PURSUANT TO RULE 29.6

Petitioners have no parent corporations and no publicly held company owns 10% or more of the stock of any of the Petitioners.

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Petitioners Banco Panamericano, Inc., Chiplease, Inc. and Leon Greenblatt respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported as *In the Matter of Resource Technology Corporation*, 430 F.3d 884 (7th Cir. 2005). It is reproduced in the Appendix at App. A. The opinion of the District Court is unreported and is reproduced in the Appendix at App. C. The opinion of the bankruptcy court is unreported and is reproduced in the Appendix at E.

STATEMENT OF JURISDICTION

The Court of Appeal's judgment was entered on December 9, 2005. A timely petition for rehearing en banc was filed, and was denied on January 11, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title 11 United States Code, Section 363(f)(3)

Use, Sale or Lease of Property

> The Trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if —
>
> * * *

(3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;

Title 11 United States Code, Section 365(a)

Executory contracts and unexpired leases

(a) Except as provided in sections 765 and 766 of this title and in subsections (b), (c) and (d) of this section, the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor.

Title 11 United States Code, Section 554

Abandonment of property of the estate

(a) After notice and a hearing, the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate.

(b) On request of a party in interest and after notice and a hearing, the court may order the trustee to abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate.

(c) Unless the court orders otherwise, any property scheduled under section 521(1) of this title not otherwise administered at the time of the closing of a case is abandoned to the debtor and administered at the time of the closing of a case

is abandoned to the debtor and administered for purposes of section 350 of this title.

(d) Unless the court orders otherwise, property of the estate that is not abandoned under this section and that is not administered in the case remains property of the estate.

STATEMENT OF THE CASE

Resource Technology Corporation (the "Debtor") was in the business of collecting combustible gas emitted by landfills. The Debtor would then either sell such gas or use such gas to power electrical generators, and then sell the resulting electricity to local utilities. The Debtor conducted these operations at a number of different facilities prior to and during its bankruptcy case.

One of the landfills at which the Debtor conducted business is located in Mount Vernon, Alabama, and commonly referred to as the Chastang Landfill. Pursuant to an agreement with Chastang Landfill, Inc. ("Chastang"), the Debtor had the exclusive right to collect gas from the Chastang Landfill. The Debtor also had a contract with Consortium Service Management Group ("CSMG") to process the gas and sell the gas to a local utility.

The Petitioners are pre-petition and post-petition lenders to the Debtor. The Petitioners held and still hold a security interest on all of the Debtor's assets. The Appellants hold a first priority lien on virtually all of the Debtor's gas collection rights and hard assets generally, and including those located at the Chastang Facility.

The Debtor and Chastang engaged in adversarial litigation during the course of the bankruptcy case, with each side claiming defaults by the other. On December 14, 2004, Gregg Szilagyi, the Chapter 11 Trustee for the Debtor[1], filed a motion seeking authorization to settle with Chastang. Pursuant to the motion and the proposed settlement agreement, the Debtor agreed to terminate the Chastang gas rights agreement and transfer to Chastang the Debtor's interest in certain hard assets at the Chastang facility. The Debtor and Chastang agreed to provide mutual releases of claims, with the Debtor dismissing its adversary complaint against Chastang.

The Petitioners opposed the settlement between the Debtor and Chastang. The Petitioners believed that the settlement would substantially destroy their collateral at the Chastang Facility, and would not otherwise benefit the Estate. To advance their view, the Petitioners submitted a competing offer to the Trustee under which the Trustee would seek to cause the Debtor to abandon the gas rights agreements, leases, equipment and other assets relating to the Chastang Facility, pursuant to Section 554 of the United States Bankruptcy Code (the "Code"), to Resource Technology Corporation unaffected by the bankruptcy proceedings. In exchange for the abandonment, the Petitioners agreed to transfer to the Chapter 11 Trustee $200,000, release $1.6 million in administrative claims and $400,000 in pre-petition secured claims, and provide other consideration.

---

1. The Debtor's bankruptcy case has been converted to a liquidation case under Chapter 7 of the United States Bankruptcy Code. The Chapter 11 Trustee was dismissed from the proceedings. Jay A. Steinberg was appointed interim Chapter 7 Trustee, and is now the Chapter 7 Trustee for the Debtor.

The Chapter 11 Trustee indicated his preference for and his desire to accept the Petitioners' settlement offer over the Chastang Settlement, but the Bankruptcy Court refused to authorize the Trustee to enter into settlement with the Petitioners. The Bankruptcy Court ruled that the Bankruptcy Code did not allow for abandonment of the executory contracts such as the gas rights agreement with Chastang. The Bankruptcy Court found that Section 365 and Section 554 of the Code deal with the same issue and are in conflict. The Bankruptcy Court found that the specific language of Section 365 dealing with executory contracts overrides the general language of abandonment of Section 554.

In response to the Petitioners' argument that the Debtor had no pecuniary interest in the Chastang contracts, and therefore the Trustee was barred from disposing of the collateral under Section 363(f) of the Code, the Court ruled that the evidence showed the recovery to be received by the Debtor under the Chastang Settlement exceeded any potential recovery the Petitioners could achieve in litigation outside the bankruptcy court.

The Petitioners appealed the bankruptcy court's decision to the United States District Court for the Northern District of Illinois. The District Court affirmed the bankruptcy court's ruling.

The Petitioners appealed to the Seventh Circuit Court of Appeals. The Seventh Circuit affirmed the lower courts' decisions. The court labeled the Petitioners' security interest in the Debtor's assets a "floating lien," and ruled that holders of such floating liens are not entitled to the protections of Section 363(f), as that section "deals with liens on specific assets." The panel also ruled that an executory contract is

not subject to abandonment by a debtor pursuant to Section 554 of the Code. The Seventh Circuit subsequently denied a petition for rehearing en banc by the Petitioners.

REASONS FOR GRANTING OF THE PETITION

The questions presented in this Petition are important questions of federal law that have not been, but should be, settled by this Court. The question of whether secured lenders with blanket liens on a debtor's assets are entitled to the protections of § 363(f) has far-reaching implications for the future availability of pre-petition and critical post-petition lending to distressed companies. The question of whether executory contracts can be abandoned pursuant to § 554 of the Code is an issue of great importance for the ability of debtors and trustees to maximize recovery for creditors.

I. REVIEW IS WARRANTED TO ALLOW THE COURT RESOLVE THE ISSUE OF WHETHER A LENDER SECURED BY A BLANKET LIEN OR A FLOATING LIEN ON ALL OF A DEBTOR'S ASSETS IS ENTITLED TO THE PROTECTIONS OF § 363 OF THE CODE.

The 7th Circuit effectively ruled that lenders such as the Petitioners, with a lien on all of a debtor's assets, are not entitled to the protections of § 363(f) of the Code. § 363(f)(3) bars a creditor from selling assets outside the ordinary course of business if the sale will not generate funds sufficient to satisfy all liens against the property. The Court of Appeals ruled that § 363(f)(3) only applies to liens on specific assets. Liens on all of a debtor's assets, such as that held by the Petitioners, which the Court of Appeals termed a "floating lien," are not entitled to the protections of § 363(f)(3),

according to the Court of Appeals. The only protections accorded such lenders, under the Court of Appeals' ruling, is the requirement that the sale be beneficial to the estate.

The 7th Circuit's interpretation of § 363(f)(3) severely restricts the protections of that section, to the great detriment of those persons and entities willing to lend to distressed or bankrupt companies. The 7th Circuit cites no authority for this proposition. No other federal appellate court has addressed this issue, for the likely reason that the 7th Circuit's interpretation is not a reasonable one. The idea that the added protection of a blanket lien on all of a debtor's assets, as opposed to liens on specific assets, could operate to reduce the protections afforded a secured creditor under the Code is antithetical to the concept of secured transactions and the Code's respect for the bargained for protections of secured creditors.

The 7th Circuit's ruling also conflicts with the unambiguous language of the Code. Section 363(f)(3)'s bar of sale of property of the estate free and clear applies to *any* interest that is a lien. Section 101(37) of the Code defines "lien" as "charge against or interest in property to secure payment of a debt or performance of an obligation." The Petitioners' liens, including liens created by order of the Bankruptcy Court to secure post-petition financing to the debtor-in-possession, expressly provide the Petitioners

> valid and perfected security interests, in and upon all of the assets of the Debtor, whether acquired prior to or after the filing of the petition commencing the Debtor's chapter 11 case, whether now owned and existing or hereafter acquired, created or arising and all product and

> proceeds thereof . . . including but not limited to, all of the Debtor's accounts, goods . . . landfill gas rights and collection facilities leases . . .

(March 3, 2000 Financing Order, ¶7.)

"In determining the scope of a statute, we look first to its language. If the statutory language is unambiguous, in the absence of 'a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive.'" *Reves v. Ernst &* Young, 507 U.S. 170, 177, 113 S. Ct. 1163, 1169, 122 L. Ed. 525 (1993) quoting *United States v. Turkette*, 452 U.S. 576, 580, 101 S. Ct. 2524, 2527, 69 L. Ed. 246 (1981). Section 363(f)(3) is unambiguous in its inclusion of any interest that is a lien. Section 101(37) is unambiguous in its broad definition of "lien". Neither section of the Code lends any support to an interpretation that would limit the application of the section to certain types of liens. The Court of Appeals cited to no case law or other authority for support for its interpretation.

The Court of Appeals also erred in finding that Petitioners' lien on the Chastang assets involved a floating lien. Decisions by the 7th Circuit and other Circuit Courts make clear that the term "floating lien" is intended to apply to constantly shifting inventory and receivables that are secured by an after-acquired property clause in a security agreement. *See Mellon Bank, N.A. v. Dick Corp.*, 351 F.3d 290 (7th Cir. 2003); *In re Smith's Homes Furnishings*, 265 F.3d 959 (9th Cir. 2001); *UNI Imports, Inc. v. Aparacor*, 978 F.2d 984 (7th Cir. 1992); *In re Filtercorp, Inc.*, 163 F.3d 570 (9th Cir. 1998).

The gas underlying the gas rights agreement may shift, but the right to the use of gas, of which the gas is only a component is a constant. While the Petitioners do hold a floating lien on the Debtor's accounts receivable and inventory, the Petitioners also hold a standard lien on the Debtor's fixed, non-malleable assets. The collateral at issue in the Chastang Settlement, the gas rights agreement relating to the Chastang Facility, falls into the latter category. As noted above, the Financing Statement expressly provides the Petitioners with a lien on the Debtor's landfill gas rights and collections facilities leases; precisely the type of agreement at issue in the Chastang Settlement. The Chastang Agreement existed prior to the bankruptcy filing and the Financing Order, and therefore does not invoke the after-acquired clause that is so critical to a floating lien. The Chastang Agreement did not represent inventory or receivables, nor was it shifting or changing collateral. Even if the 7th Circuit was correct in ruling that Section 363(f) applies only to liens on specific assets and not to floating liens, the Petitioners were entitled to the protection of Section 363(f)(3).

Subsumed in the issue regarding the interpretation of § 363(f)(3) is the indication by the Court of Appeals that the type of transaction involved in the Chastang Settlement was an ordinary course transaction. While discussing Section 363(f), the 7th Circuit stated "a borrower remains free to transact in the course of its business, and if it sells gas—or settles a lawsuit—the proceeds become subject to the lien." The necessary finding by the Court of Appeals is that the settlement with Chastang was in the ordinary course of business of the Debtor.

The Court of Appeals is mistaken. The Chastang settlement was not made in the ordinary course of business

of the Debtor. Clearly, the Debtor was not in the business of settling lawsuits; rather its business concerned operating under landfill gas agreements, such as the Chastang Landfill Gas Agreement. The effect of the Chastang Settlement was 1) termination of the Chastang Landfill Gas Agreement, an executory contract; 2) release of claims by the Debtor and Chastang; 3) payment to the Debtor of $75,000 in exchange for the contract termination and release; 4) modification of the automatic stay to allow Chastang to take possession of the plant equipment; and 5) dismissal of the adversary proceeding, in which the Debtor had sought injunctive relief and monetary damages. A settlement of this nature cannot in any way be characterized as in the course of business of any debtor.

§ 363(c) of the Code allows that a trustee operating the debtor's business may enter into transactions and use property of the estate in the ordinary course of business without notice or a hearing. Conversely, Rule 9019 of the Federal Rules of Bankruptcy Procedure provides for court approval of a compromise or settlement, upon a motion by the trustee and following notice to creditors and a hearing. If settlement of a claim was in the ordinary course, Rule 9019 would not require notice and a hearing. Whether the settlement evidences the Trustee's business judgment is in question, since the Trustee's expressed his preference for the Petitioners' offer, which the Bankruptcy Court prevented him from accepting.

Part of the Chastang Settlement involved the rejection of the Chastang Gas Rights Agreement. § 365 of the Code allows a trustee to reject an executory contract, subject to court approval. Case law demonstrates that the trustee must show that rejection will benefit the estate.

> In determining whether rejection of the lease would be advantageous to the estate, the court must apply the business judgment test. See, e.g., *N.L.R.B. v. Bildisco and Bildisco*, 465 U.S. 513, 523 (1984). Under this test, the debtor's business judgment on whether to reject an executory contract must be accorded deference unless shown that the bankrupt's decision was taken in bad faith or in gross abuse of the bankrupt's retained discretion. *Lubrizol Enterprises v. Richmond Metal Finishers*, 756 F.2d 1043, 1047 (4th Cir. 1985), cert. denied, 475 U.S. 1057 (1986). Nevertheless, rejection will not be permitted if there is no showing of benefit to the estate or if the risk of harm to the other party to the contract will be disproportionate to the benefit to the estate.

In re First Wellington Canyon Associates, 1989 WL 106838.

Therefore, rejection of an executory contract is not an ordinary course transaction that a trustee can undertake without court approval.

As part of the Chastang Settlement, the Trustee transferred Estate property, including certain personal property at the Chastang Landfill. The transfer of Estate property as part of a settlement is not within the ordinary course of business of a debtor. *In re Fidelity Standard Mortgage Corp.*, 839 F.2d 1517 (11th Cir. 1988). This is further demonstrated by the fact that the Trustee filed a motion pursuant to Rule 9019 seeking authority to enter into the settlement.

The error by the Court of Appeals does not constitute a mere misunderstanding of the facts of the matter, with limited impact beyond this case. Rather, the ruling stands as precedent that may materially impact the manner in which vital lending is made available to troubled or bankrupt entities. The 7th Circuit's ruling carries the danger that lenders may shy away from providing otherwise available financing due to the apparent ability of Debtors in the 7th Circuit to sell assets free and clear of liens without satisfying § 363(f)(3).

II. REVIEW IS WARRANTED TO ALLOW THE COURT RESOLVE THE ISSUE OF WHETHER A DEBTOR CAN ABANDON AN EXECUTORY CONTRACT OR UNEXPIRED LEASE PURSUANT TO SECTION 554 OF THE CODE.

The settlement offered by the Petitioners to the Debtor, as an alternative to the Chastang Settlement, required the Debtor to abandon the Chastang gas rights agreement under Section 554 of the Code. The Bankruptcy Court found that an executory contract, such as the gas rights agreement, could not be abandoned under Section 554, and could only be administered through assumption or rejection under Section 365. The Court of Appeals agreed that the Debtor could not abandon the Chastang contract under Section 554 of the Code. However, the Court of Appeals did not focus on the alleged conflict between Section 554 and Section 365; rather, it found that 1) while a contract right might be property of the estate, performance obligations under a contract are not property of the estate, and 2) if the contract right was abandoned, it would disappear, along with the Petitioners' security interest. The Court of Appeals stated "[a] right that is abandoned is gone. Once [the Debtor's] right to harvest

gas disappears, the entitlement reverts to the landfill's owner—Chastang."

The Court of Appeals' ruling shows a fundamental misunderstanding of the concept of abandonment under § 554. The 7th Circuit appears to have applied a common law/ state law view of abandonment of a contract, i.e. a rejection of a contract which would constitute a breach and a termination of the contract. Abandonment under § 554 is a different type of animal. Abandonment of property of a bankrupt estate merely passes the property to the pre-petition debtor unaffected, outside the purview of the bankruptcy court and the administration of the bankrupt estate. Abandonment of a contract right under § 554 would not terminate the contract or make it "vanish in a puff of smoke." It would merely pass the contract back to the original contracting party, the pre-petition debtor, and would enable the Petitioners to take any available steps to foreclose on their security interest, free of the automatic stay and other constrictions of the bankruptcy court's administration.

All the relevant case law addressing the issue suggests that a trustee can abandon executory contracts belonging to the bankruptcy estate. *See In re DeVlieg, Inc.*, 1993 WL 248205 (N.D. Ill. 1993) (an executory contract remains in force in a chapter 11 reorganization until it is rejected and unless rejected, it passes with other property of the debtor to the reorganized corporation) (citations omitted); *In re Argonaut Financial Services, Inc.*, 164 B.R. 107 (N.D. Cal. 1994) (secured creditors with security interest in debtor's ground lease were granted time to bring a motion under Section 554 to compel the abandonment of the ground lease by the estate such that the secured creditors could pursue

their security interests in the lease); *In re Bernard*, 69 B.R. 13 (Bankr. D. Haw. 1986) (a security interest holder in debtor's leasehold could bring a motion for abandonment prior to the running of the sixty day period to avoid the operation of Section 365(d)(4)); *see also, In the Matter of O'Connor*, 258 F.3d 392 (5th Cir. 2001) (executory contracts which are neither assumed nor rejected pursuant to a chapter 11 plan pass through the bankruptcy proceeding to the pre-bankruptcy debtor unaffected by the bankruptcy proceedings).

Abandonment of executory contracts in the chapter 11 context is often implied by way of a "ride-through." The term "ride-through" refers to executory contracts which are neither assumed nor rejected during the course of a chapter 11 case and therefore such contracts "ride-through" the bankruptcy unaffected and revest with the reorganized debtor upon the closing of the case. *See* 11 U.S.C. § 554(c) ("any property [of the estate] not otherwise administered at the time of the closing of a case is abandoned to the debtor); *see also* Mark R. Campbell and Robert C. Hastie, *Executory Contracts: Retention Without Assumption In Chapter 11 – "Ride Through" Revisited*, 19 Am. Bankr. Inst. J. 33, 34-35 (March 1, 2000). (See cases cited therein.)

Contrary to the 7th Circuit's ruling, if the gas rights agreement is abandoned, it remains subject to the Petitioners' lien. The only difference is that it is in the hands of the pre-petition debtor. Any rights of performance that the estate had remain in place in the pre-petition debtor. Any rights or claims that Chastang had with regard to any breaches also remain in place. The Petitioners' right to foreclose their security interest in the gas rights agreement would survive abandonment.

The effects of the 7th Circuit's ruling are potentially far reaching. By foreclosing the possibility of abandonment of executory contracts, the Court of Appeals has limited the ability of a debtor or trustee to effectively reorganize under the guidance of the bankruptcy courts. The Chapter 11 Trustee in the present case desired to accept the Petitioners' alternate settlement. It provided a better deal for the estate and the greater possibility of distribution to unsecured creditors. The Bankruptcy Court's ruling, however, as affirmed by the district court and the Court of Appeals, prevented the trustee from maximizing the administration of the Debtor's assets.

CONCLUSION

For all the foregoing reasons, Petitioners respectfully request that the Supreme Court grant review of this matter.

Respectfully submitted,

GREGORY J. JORDAN
Counsel of Record
EVANGELOS J. GEGAS
PETER J. SCHMIDT
DYKEMA GOSSETT PLLC
10 South Wacker Drive
Suite 2300
Chicago, IL 60606
(312) 876-1700

Attorneys for Petitioners

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DECIDED DECEMBER 9, 2005

In the
UNITED STATES COURT OF APPEALS
for the Seventh Circuit

No. 05-1779

In the Matter of:

RESOURCE TECHNOLOGY CORPORATION
(by Gregg E. Szilagyi, Trustee),

Debtor-Appellee.

Appeal of:

Leon Greenblatt; Banco Panamericano, Inc.;
and Chiplease, Inc.

Argued November 7, 2005—Decided December 9, 2005

Before POSNER, EASTERBROOK, and WOOD, *Circuit Judges.*

EASTERBROOK, *Circuit Judge.* Resource Technology Corporation turns garbage into money by collecting methane from landfills, reducing the emission of a greenhouse gas in the process. It either sells the methane or burns the gas to make electricity. Installing methane-collection systems is tricky, however, and Resource Technology landed in bankruptcy because its outlays exceed its revenues from harvested methane. This appeal concerns one of its money-losing ventures.

Appendix A

In 1996 Resource Technology agreed with Chastang Landfill, Inc., in Mount Vernon, Alabama, to build a gas-collection system. Consortium Service Management Group contracted to buy the scavenged gas, which it planned to purify and resell to a local utility. By 1999 the collection system had not been completed, and Chastang terminated the contract. Litigation ensued and was settled: Resource Technology promised to finish the system by September 2002 and gave Chastang a promissory note to cover costs it had incurred. When that deadline passed with the system still not operable, Chastang again terminated the agreement and Resource Technology, by then in bankruptcy, filed an adversary proceeding. A second settlement was reached and a final deadline for completion set: March 31, 2003. That deadline, too, passed with the system unfinished, and another adversary proceeding followed. A third settlement was reached, this time with the Trustee in bankruptcy. Chastang and Consortium Service Management agreed to release Resource Technology from its obligation to finish the system, to forgive the promissory note, to abandon any claim to damages, and to pay $75,000; in exchange the Trustee agreed to give up Resource Technology's right to the methane.

Before the bankruptcy court approved this settlement, Resource Technology's principal creditors (holding about $40 million in debt claims, secured by a floating lien on the firm's assets) made the Trustee a better offer. In exchange for a right to complete the system and collect the methane, the lenders offered to pay the estate $200,000 and release $2 million of their debt claims; they promised to indemnify the estate for any sums it should be required to pay on account of delay in completing the system. The Trustee preferred this

offer to Chastang's but could not see how to implement the proposal, for the contract between Resource Technology and Chastang has an anti-assignment clause, and at all events had been terminated because of Resource Technology's enduring delinquency.

The lenders proposed that the right to collect the gas could be transferred to them if the Trustee were to abandon the executory portion of the contract between Resource Technology and Chastang. The lenders then could use their security interest to step into Resource Technology's position. Bankruptcy Judge Wedoff concluded, however, that an executory contract cannot be abandoned under 11 U.S.C. § 554; the debtor's choices are limited to assumption or rejection under 11 U.S.C. § 365—and, once a contract has been assumed (as this one was), to performance or breach. Abandonment would just break the debtor's promise and support a claim for damages; it could not transfer Resource Technology's rights to the lenders. Judge Wedoff therefore approved the settlement with Chastang, and District Judge Kennelly affirmed. 2005 WL 2588860, 2005 U.S. Dist. LEXIS 4101 (N.D.Ill. March 18, 2005).

The lenders' appeal has been met at the outset with a contention that the litigation is moot. All requests for a stay were denied, and the settlement between Chastang and the Trustee has been consummated. The $75,000 has been paid; Chastang's claims have been released; someone else has taken over completion of the system and the collection of gas. Yet why should this end the controversy? A case is moot when no further judicial relief is possible. See *Church of Scientology v. United States*, 506 U.S. 9, 113 S.Ct. 447, 121

L.Ed.2d 313 (1992). By that standard, this dispute is live. A court could order the Trustee to return Chastang's money, reinstate its claims for damages and payment on the note, and direct Chastang to deliver the gas to the lenders. Unscrambling a transaction may be difficult, but it can be done. No one (to our knowledge) thinks that an antitrust or corporate-law challenge to a merger becomes moot as soon as the deal is consummated. Courts can and do order divestiture or damages in such situations. Perhaps Chastang has in mind not mootness but judicial reluctance to upset legitimate reliance interests. See 11 U.S.C. § 363(m); *In re UNR Industries, Inc.*, 20 F.3d 766 (7th Cir.1994). Appellees do not contend, however, that anyone who has relied on the settlement would be left in the lurch; the lenders could be ordered to compensate the firm that completed the system and collects the gas. So we must resolve the merits.

The lenders want us to decide whether § 365 (which addresses the assumption or rejection of executory contracts) supersedes § 554 (which authorizes debtors to abandon assets). They contend that these sections of the Bankruptcy Code may be reconciled. Maybe so, see *Precision Industries, Inc. v. Qualitech Steel SBQ*, LLC, 327 F.3d 537, 544 (7th Cir.2003), but that's not the real issue. Suppose that § 554 were the only part of the Code with any relevance. Still, the creditors would face two problems: first, a debtor may abandon assets but not contractual duties; second, abandonment would end the business deal rather than pass any rights through to the lenders.

Section 554(a) provides: "After notice and a hearing, the trustee may abandon any property of the estate that is

burdensome to the estate or that is of inconsequential value and benefit to the estate." The phrase "property of the estate" is not defined in the Code; courts look to state law to determine what kind of "property" an estate possesses. See *Butner v. United States*, 440 U.S. 48, 99 S.Ct. 914, 59 L.Ed.2d 136 (1979). The normal use of § 554 is to give up an interest in real estate that is burdened by a debt so large that the equity value is negligible or negative. That is not its sole use, however. A contract right—say, a right to purchase a parcel of land—usefully may be understood as "property" for this purpose. States generally deem options and equivalent entitlements to be varieties of property. But does either Illinois or Alabama (the two states involved in the contract between Resource Technology and Chastang) treat a duty of performance under a contract as a property right?

Normally a duty is the opposite of a right. And that's the lenders' main problem. Resource Technology had a duty to complete the gas-collection system; it had a right to collect the gas only after fulfilling that duty. When the lenders asked the Trustee to "abandon" the contract, Resource Technology had not finished the collection system. Abandonment then would have been nothing but breach; and if Resource Technology repudiated its promise (already broken by delay), it would have lost any right to the gas. There was no property interest the Trustee could abandon.

If one were to treat a package of rights and duties as a single property interest, in the way a contract as a whole might be sold (in the absence of an anti-assignment clause), how would abandonment of that package give the lenders any entitlement to the gas? A right that is abandoned is gone.

Appendix A

Once Resource Technology's right to harvest gas disappears, the entitlement reverts to the landfill's owner—Chastang. The lenders seem to think that their security interest would direct the gas to them, free from the anti-assignment clause, but their security is in the contract rather than in the gas. If the contract is abandoned, the security disappears. A contract right in this respect differs from real estate or chattels, which continue to exist even if a given party's stake is abandoned. When a contract terminates, the asset covered by the floating lien vanishes in a puff of smoke. So the bankruptcy judge was right to hold that the lenders' proposal is legally impossible.

Finally we must consider § 363(f)(3), which says that a trustee cannot dispose of a secured party's collateral over objection unless the price realized exceeds the value of the lien. Appellants maintain that this provision forbids the settlement between the Trustee and Chastang. Yet why should we treat the settlement as the disposition of collateral? Section 363(f)(3) deals with liens on specific assets. A floating lien does not attach to particular assets; a borrower remains free to transact in the course of its business, and if it sells gas—or settles a lawsuit—the proceeds become subject to the lien. Out of bankruptcy Resource Technology and Chastang could have settled their dispute without any hindrance from the lenders; a Trustee has the same power in bankruptcy. Creditors that hold floating liens are protected by the requirement that the Trustee's decisions be beneficial to the estate. Judge Wedoff concluded, after a hearing, that this settlement is beneficial. This means that the lenders are better off than they would be if Resource Technology, having failed to complete the system, were exposed to liability on

the note and damages for breach, while losing the right to harvest and sell the gas. Section 363(f)(3) does not block transactions that make creditors better off. These lenders are not as well off as they would be if they could harvest the methane, but as we have explained that is not an available option.

AFFIRMED.

A true Copy:

Teste:

_____

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DATED DECEMBER 9, 2005

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

JUDGMENT - WITH ORAL ARGUMENT

Date: December 9, 2005

BEFORE: Honorable RICHARD A. POSNER, Circuit Judge

Honorable FRANK H. EASTERBROOK, Circuit Judge

Honorable DIANE P. WOOD, Circuit Judge

No. 05-1779

IN RE:

RESOURCE TECHNOLOGY CORPORATION,

Debtor-Appellee

APPEAL OF: LEON GREENBLATT,
BANCO PANAMERICANO, INCORPORATED
and CHIPLEASE INCORPORATED,

The judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered on this date.

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS DATED MARCH 18, 2005

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS

Name of Assigned Judge
or Magistrate Judge:
Matthew F. Kennelly

CASE NUMBER:
05 C 1508

DATE:
3/18/2005

CASE TITLE:
In Re: Resource Technology Corp. (Chastang settlement)

DOCKET ENTRY TEXT:
For the reasons stated below, the Court affirms the decision of the Bankruptcy Court. The Clerk is directed to enter judgment affirming the Bankruptcy Court's decision.

STATEMENT

In 1996, Resource Technology Corp. entered into a contract with the predecessor of Chastang Landfill, Inc., the operator of an Alabama landfill, in which RTC promised to install and operate a system for collecting and converting methane gas generated from the decomposition of landfill waste. Chastang terminated the contract in 1999 due to RTC's alleged failure to perform, and RTC filed suit. While the suit

was pending, an involuntary bankruptcy proceeding was filed against RTC. To resolve the Chastang lawsuit, RTC agreed to install and operate a gas conversion system by September 2002. The settlement included RTC's execution of a promissory note payable to Chastang to cover costs incurred to complete the system. RTC did not meet the deadline, Chastang terminated the settlement agreement, and RTC filed an adversary proceeding against Chastang in the bankruptcy case. That action was settled, with RTC agreeing to a final deadline of March 31, 2003 to complete the gas conversion system.

RTC did not meet the March 2003 deadline, and Chastang against terminated its agreement with RTC. RTC filed a second adversary proceeding to challenge the termination. After a bankruptcy trustee was appointed, he amended the complaint, alleging that RTC's default should be excused because Chastang had improperly interfered with RTC's ability to perform. The trustee, however, concluded that RTC's legal position was weak, in part because RTC had also defaulted on the promissory note, which constituted a separate default under the agreement with Chastang. And if it lost the case, the debtor would owe Chastang nearly $545,000 under the promissory note, plus attorney's fees of at least $200,000 and lost royalties, and it would remain obligated to perform under the contract. Chastang and CSMG, the company that RTC had hired to install and operate the gas conversion system, proposed a settlement under which Chastang would release its claims and CSMG would pay the estate $75,000 and withdraw the $6 million administrative claim that it had filed in the bankruptcy case. In return, the estate would release any rights it had to collect gas from the

landfill. The trustee asked the bankruptcy court to approve the proposed settlement.

Several lenders, the appellants in this case, had provided some $40 million of pre-petition and post-petition financing to RTC, in return for a security interest in all the property of the estate. The lenders opposed approval of the settlement, arguing that it was not in the estate's best interests because it would result in a destruction of the lender's collateral and the value of the estate's interest in the gas collection rights. The lenders made an offer to the trustee in which they proposed to pay the estate $200,000 and release $1.6 million in administrative claims and $400,000 in pre-petition secured claims, in return for abandonment of the estate's rights vis-a-vis the Chastang landfill and transfer of those rights to the lenders, subject to the claims of all other creditors and parties in interest.

The bankruptcy court heard evidence regarding the underlying dispute and the proposed settlement. The trustee reported that he would recommend approval of the lenders' proposed deal, but only if the court considered its terms legal under the Bankruptcy Code. The bankruptcy court found that the lenders' proposal required the abandonment and assignment of an executory contract, which the court concluded was an unavailable form of relief under the Bankruptcy Code. The court also found that the trustee's position in the Chastang litigation was "very weak" and its likelihood of prevailing "extraordinarily remote." It concluded that the settlement proposed by Chastang and CSMG represented an excellent outcome for the estate. The court therefore approved the proposed settlement.

Appendix C

The lenders have appealed, making two arguments. First, they argue that the bankruptcy court erred in approving the Chastang settlement over the objection of a secured creditor that had made a better offer. Second, they argue that the court erred in approving the disposition of the estate's Chastang assets before determining that the estate actually held a pecuniary interest in those assets. The bankruptcy court's decision is reviewed on appeal for abuse of discretion. *See In re Irvin*, 950 F.2d 1318, 1320 (7th Cir.1991); *In re Chung King, Inc.*, 753 F.2d 547, 549 (7th Cir.1985).

The second issue raised by the lenders concerns the appropriateness of approving the settlement before making a definitive determination as to whether the estate had a pecuniary interest in the collateral. Essentially the lenders' argument is that the value of the collateral did not exceed the lenders' interest and that it was inappropriate for the trustee to be disposing of property that belonged to the lenders. *See* 2/1/05 Tr. 186. In light of that argument by the lenders, the bankruptcy court required the trustee to meet a higher standard of proof for approval of the settlement than would otherwise apply. *Id.* The court concluded that the trustee had met that burden, stating that the evidence that the contract had terminated was "overwhelming" and that the $75,000 that the estate would receive—and that the lenders could claim belonged to them as proceeds of their collateral—was "greater relief than [the lenders] would be able to obtain in litigation." *Id.* 186-87.

In their appeal brief, the lenders simply repeat, without elaboration or explanation, their argument that it was inappropriate to approve the settlement before making a

definitive determination that the estate had equity in the Chastang assets. Lenders' Brief at 9-10. They offer no challenge to the bankruptcy court's considered determination that the cash that the estate would receive under the settlement was far more than could be obtained in litigation. Under the circumstances, there is no basis for this Court to overturn that finding by the bankruptcy court.

The bankruptcy court's decision to reject the lenders' offer was premised upon its determination that the acceptance of the offer required "abandonment" of the estate's interest in an executory contract, a form of relief that the court concluded was unavailable under the Bankruptcy Code. The lenders argue that this was an error of law. The Court disagrees.

Abandonment of property with inconsequential value is authorized under section 554 of the bankruptcy code. This is a general provision of the Code that the lenders contend covers all types of property held by an estate, including executory contracts. But "[h]owever inclusive may be the general language of a statute, it 'will not be held to apply to a matter specifically dealt with in another part of the same enactment. . . . Specific terms prevail over the general in the same or another statute which otherwise might be controlling.'" *Fourco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222, 228-29 (1957) (quoting *Ginsberg & Sons v. Popkin*, 285 U.S. 204, 208 (1932)). A different provision of the code, section 365, governs how the estate deals with executory contracts, allowing the trustee to assume or reject them. Assumption of a contract requires the trustee to show that the estate can cure existing defaults and give

assurances of future performance; assumption places the estate in the shoes of the debtor and makes the contract obligations priority administrative expenses. *See In re Resource Technology Corp.*, 254 B.R. 215, 221 (Bankr.N.D. Ill.2000). If the trustee wishes to assign an assumed contract, the assignee must provide adequate assurance of future performance. *Id.* The alternative to assumption of an executory contract is its rejection. In the event of a rejection, the contract is deemed breached, and the other party is given a non-priority claim against the estate. *Id.*

Because the Code includes a specific provision focusing on executory contracts, this Court agrees with the bankruptcy court that it is inappropriate to construe section 554 to permit abandonment of such contracts without regard to section 365. When an executory contract is involved, "abandonment" also affects the rights of the other contracting party. Section 365, among other things, takes account of those rights by providing the other contracting party with certain protections. Applying section 554 to an executory contract would undercut these protections.

Finally, as Chastang notes in its brief, the Code's provision regarding executory contracts bars a trustee from assigning an executory contract—part of the settlement proposed by the lenders—if the other contracting party is excused under the law from accepting performance from or rendering performance to an entity other than the debtor. 11 U.S.C. § 365(c). Such was the case here; as Chastang points out, the agreements between RTC and Chastang barred RTC from assigning its interests without first obtaining Chastang's consent.

Appendix C

The lenders offer no other challenge to the bankruptcy court's determination that the Chastang settlement was in the best interests of the estate. For the reasons stated above, the Court affirms the bankruptcy court's ruling. The Clerk is directed to enter judgment affirming the decision of the bankruptcy court.

APPENDIX D — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION DATED MARCH 18, 2005

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case Number: 05 C 1508

In Re: Resource Technology

v.

JUDGMENT IN A CIVIL CASE

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury rendered its verdict.

■ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered,

IT IS HEREBY ORDERED AND ADJUDGED that judgment is entered affirming the Bankruptcy Court's decision.

Michael W. Dobbins, Clerk of Court

/s/ Olga Rouse, Deputy Clerk

Date: 3/18/2005

APPENDIX E — ORDER OF THE UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION DATED FEBRUARY 1, 2005

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Chapter 11

Case No. 99 B 35434

Hon. Eugene R. Wedoff

In re:

RESOURCE TECHNOLOGY CORPORATION,

Debtor.

ORDER APPROVING SETTLEMENT AGREEMENT BETWEEN AND AMONG GREGG E. SZILAGYI, TRUSTEE FOR RESOURCE TECHNOLOGY CORPORATION, CHASTANG LANDFILL, INC., AS ASSIGNEE AND SUCCESSOR TO TRANSAMERICAN WASTE INDUSTRIES, INC., WASTE MANAGEMENT HOLDINGS, INC. AND CONSORTIUM SERVICE MANAGEMENT GROUP

This matter coming before the Court on the Motion of the Chapter 11 Trustee, Gregg E. Szilagyi ("Trustee"), for Entry of an Order (1) Approving the Settlement Agreement, (2) Modifying The Automatic Stay and (3) Granting Other Related Relief, with due and sufficient notice having been given, and the Court having considered the record of these

proceedings to date; and the Court being otherwise fully advised in the premises, and good and sufficient cause otherwise appearing,

IT IS HEREBY ORDERED and found that:

1. The motion is granted.

2. The Settlement Agreement was made and entered into in good faith, and this order adopts and incorporates the terms and conditions of that Agreement herein.

3. The Settlement Agreement is approved.

4. The Modified Chastang Landfill Gas Agreement (the December 23, 1996 "Original Agreement" as modified and amended by (1) the January 24, 2002 "Amended Agreement (consisting of an amendment and settlement agreement of that date) and (ii) the January 17, 2003 settlement agreement) is deemed to be terminated as of June 25, 2003.

5. The agreement between CSMG and RTC is hereby terminated.

6. All amounts due and owing of any kind or nature by RTC and the Bankruptcy Estate under the Promissory Note and Security Agreement both dated January 30, 2002 and referenced in the Modified Chastang Landfill Gas Agreement are deemed satisfied, forgiven and resolved in full by the Settlement Agreement and this Order.

7. CSMG shall pay to the Trustee $75,000 within thirty days of the date of this Order.

8. Chastang and WMH shall have no administrative expense claim, general unsecured claim, or other claim against the RTC bankruptcy estate ("Bankruptcy Estate") and all such claims shall be deemed withdrawn with prejudice and disallowed.

9. CSMG shall have no administrative claim, general unsecured claim, or other claim against the Bankruptcy Estate, and any and all such claims shall be deemed satisfied, resolved and or withdrawn with prejudice and disallowed.

10. Ownership of any and all property related to the gas collection system and all appurtenant equipment (but not including the scrubber plant) is and shall become vested in Chastang free and clear of any and all liens, claims, encumbrances or security interests granted by the Debtor, the Trustee or the Bankruptcy Estate (except those granted to Chastang, WMH and CSMG), and any and all covenants, rights and remedies created by the Modified Chastang Landfill Gas Agreement, including, without limitation, those covenants, rights and remedies subject to collateral assignment, are terminated, except that the components comprising the scrubber plant arc the property of CSMG.

11. The terms of this Court's February 1, 2002 Agreed Order are hereby affirmed and the automatic stay under Section 362 of the Bankruptcy Code remains vacated to allow Chastang and/or WMH to take all action to retain possession of all equipment comprising the gas collection system (but

not including the scrubber plant) to the exclusion of all others, and to do any and all things to implement the provisions of this Order.

12. The automatic stay under Section 362 of the Bankruptcy Code is hereby modified to permit CSMG to take any and all action to retain possession and exercise control over the scrubber plant and to do any and all things to implement the provisions of this Order. Nothing in this Order, however, in any way affects or modifies any rights, contractual or otherwise, existing between CSMG and Chastang with regard to access to the property or operation and removal of the scrubber plant.

13. The Trustee is hereby granted the authority to, and shall, take all actions necessary to implement this Order and the Settlement Agreement, including terminating permits, licenses or contracts entered into by RTC with respect to the Chastang Landfill.

DATED: 2-1-05

ENTERED:

By: s/ Eugene R. Zedoff
United States Bankruptcy Judge

APPENDIX F — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DENYING PETITION FOR REHEARING DATED JANUARY 11, 2006

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

January 11, 2006

Before

Hon. RICHARD A. POSNER, Circuit Judge

Hon. FRANK H. EASTERBROOK, Circuit Judge

Hon. DIANE P. WOOD, Circuit Judge

No. 05-1779

In the Matter of:

RESOURCE TECHNOLOGY CORPORATION
(BY GREGG E. SZILAGYI, TRUSTEE),

Debtor-Appellee.

APPEAL OF:

LEON GREENBLATT; BANCO PANAMERICANO, INC.; AND CHIPLEASE, INC.

Appendix F

ORDER

Appellants filed a petition for rehearing and rehearing en banc on December 23, 2005. No judge in regular active service has requested a vote on the petition for rehearing en banc,* and all of the judges on the panel have, voted to deny rehearing. The petition for rehearing is therefore DENIED.

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* Judge Williams did not take part in the consideration of this matter.

(3)

No. 05-1307

Supreme Court, U.S.
FILED
JUN 14 2006
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

BANCO PANAMERICANO, INC., *et al.*,

Petitioners,

v.

CHASTANG LANDFILL, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS CHASTANG LANDFILL, INC., WASTE MANAGEMENT HOLDINGS, INC., AND CONSORTIUM SERVICES MANAGEMENT GROUP

PHILIP L. COMELLA
Counsel of Record
DAVID J. REIER
LAWRENCE P. POSTOL
SEYFARTH SHAW LLP
55 E. Monroe Street
Suite 4200
Chicago, IL 60603
(312) 346-8000

JOHN VAN GESSEL
GROUP GENERAL COUNSEL
WASTE MANAGEMENT
Suite 1600
2859 W. Paces Ferry Road
Atlanta, GA 30339
(770) 805-3350

Attorneys for Respondents Chastang Landfill, Inc. and Waste Management Holdings, Inc.

WILLIAM I. KOHN
BENESCH FRIEDLANDER
COPLAN & ARONOFF LLP
2300 BP Tower
200 Public Square
Cleveland, OH 44114-2378
(216) 363-4182

Attorneys for Respondent Consortium Services Management Group

SUPREME COURT RULE 29.6 DISCLOSURE STATEMENT

Waste Management, Inc., a publicly-traded corporation, is the parent corporation of Respondent, Waste Management Holdings, Inc. Waste Management Holdings, Inc. is the parent corporation of Waste Away Group, Inc., which in turn is the parent corporation of Respondent Chastang landfill, Inc. No publicly-held company owns 10% or more of the stock of Waste Management, Inc.

Consortium Service Management Group, Inc. ("CSMG") is a public company doing business as CSMG Technologies, Inc. and is otherwise not affiliated with any other public companies. There is no parent and no entity, public or otherwise, holds 10% or more of the stock of Consortium Service Management Group, Inc.

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Michael T. Andrew, *Executory Contracts in Bankruptcy: Understanding "Rejection,"* 59 U. Colo. L. Rev. 845 (1988) 10

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I. INTRODUCTION

A. Summary of Reasons for Denying Petition

The underlying decision of the United States Court of Appeals for the Seventh Circuit does not conflict with the decision of any other federal circuit court. Nor does the *Petition for a Writ of Certiorari* meet any other standard governing review by this Court. Rather, the bankruptcy court applied a single, well-grounded bankruptcy principle to the facts: executory contracts are "abandoned" by the bankruptcy estate through the contract rejection provisions contained in Section 365 of the Bankruptcy Code, not through the property abandonment provisions of Section 554 of the Code. The Petitioners' contentions to the contrary, the bankruptcy court's application of this principle to the facts presented does not warrant review by this Court.

Petitioners would urge this Court to adopt the novel theory that executory contracts, even those assumed by the bankruptcy estate can, as an alternative, be abandoned under Section 554 of the Code, thereby avoiding the rejection and breach provisions of Section 365. Any such theory conflicts with elementary principles of statutory construction, fails to further the goals of the bankruptcy law, and leads to a conflict between two otherwise consistent provisions The Petitioners endorse this theory because they seek to avoid complying with Section 365, including provisions protecting non-debtor contracting parties such as Chastang. This set of circumstances is hardly one appropriate for review by this Court.

B. Misstatements of Fact in Petition for a Writ of Certiorari

The Petitioners' *Statement of the Case* contains a number of misstatements that should be corrected. The Petitioners claim, at page 3 of their *Petition*, that they "conducted business"[1] at the Chastang Landfill in Mount Vernon, Alabama. This is wrong. Evidence presented at the hearing before the bankruptcy court showed beyond dispute that RTC never delivered or sold any landfill gas to an end-user and also failed to install the necessary equipment to allow the gas scrubber to commence operations. (Trans. Vol. I, J. Connolly, 171-72; G. Szilagyi, at 55-56; D. Robbins, at 106-07, Item 7, Ex. 2, DC Docket #7; Requests for Admission, Nos. 6-10; 13-17; 21, Item 2, Ex. 21.)[2] Chastang terminated the agreement because of RTC's failure to conduct any business at the landfill. (Trans. Vol. I, J. Van Gessel, at 132-33, Item 7, Ex. 2; and Item 2, Ex. 8.)

The Petitioners also wrongly claim that they "hold a first priority lien on virtually all of the Debtor's gas collection assets generally, and including those at the Chastang Facility."

1. Petitioners make the same misstatement at page 10 where they claim that RTC's "business concerned operating under landfill gas agreements, such as the Chastang Landfill Gas Agreement." This may have been in RTC's business plan, but they did not execute it.

2. This brief follows the following format for citations to the record: (1) citations to trial or record exhibits will be to the Item No. on the district court record transmittal and the Exhibit No.; e.g., "Item 7, Ex. 4;" (2) "BR Docket" and "DC Docket" refer to the bankruptcy court and district court dockets, respectively, as contained in Vol. 1 of 2 of the Record on Appeal in the Seventh Circuit; (3) Transcript of Proceedings is found at Item 7, Ex. 2; DC Docket # 7 (hereinafter, Trans. Vol. "x", at "y.") (Transcript is also at Item 2, Ex. 22).

In fact, in 2002, the Petitioners subordinated their lien on the gas collection system and "all products and proceeds thereof" to Chastang. (Item 2, Ex. 5, Security Agreement; and Item 2, Ex. 6, Lien Subordination Agreement.)

C. Supplementary Background Information

The decision of the Seventh Circuit Court of Appeals aptly summarizes the factual and procedural background. However, it is worth noting why the Petitioners are seeking authority for the trustee to abandon an assumed executory contract without following the formal rejection provisions of Section 365 of the Code. When the debtor-in-possession assumed the gas collection agreement as part of the first court-approved post-petition settlement, the parties expressly agreed that "if [Resource Technology Corporation] or any party acting on its behalf moves to reject the Settlement Agreement or the Agreement or any part or aspect thereof," then the promissory note would become immediately due and payable without notice. (Item 2, Ex. 3, Promissory Note.) Collectively, the documents comprising that settlement agreement provided that failure to make payment on the note would give Chastang the right to terminate the Agreement. (*Id.; see also* Item 2, Ex. 2, Amendment, ¶ 20(f).) A trustee's rejection of an assumed, executory contract is a breach of contract, with damages treated as a first priority administrative expense. 11 U.S.C. § 365(g) (2005). Thus, the trustee's rejection of the gas collection agreement would have resulted in potentially millions of dollars of administrative expense claims and would have *ipso facto* justified termination of the contract. The central issue in this matter is whether a creditor can compel the trustee to use Section 554's property-abandonment provisions to evade this result.

II. FEDERAL CIRCUIT COURTS AGREE THAT REJECTION UNDER SECTION 365, NOT ABANDONMENT UNDER SECTION 554, PROVIDES THE MECHANISM FOR REMOVING BURDENSOME EXECUTORY CONTRACTS FROM AN ESTATE.

All other federal circuit courts that have addressed the issue agree with the Seventh Circuit that rejection under Section 365 of the Bankruptcy Code is the proper mechanism for abandoning an executory contract. *See, e.g., Sipes v. General Dev. Corp. (In re General Dev. Corp.)*, 84 F.3d 1364, 1375 (11th Cir. 1996) ("Section 365 enables the bankruptcy trustee to affirm or reject leases and executory contracts, and is based on the trustee's long-standing power to abandon obligations burdensome to the estate") (citations omitted); *Orion Pictures Corp. v. Showtime Networks (In re Orion Pictures Corp.)*, 4 F.3d 1095, 1098 (2d Cir. 1993) ("purpose behind allowing the assumption or rejection of executory contracts is to permit the trustee or debtor-in-possession to use valuable property of the estate and to 'renounce title to and abandon burdensome property'") *quoting* 2 COLLIER ON BANKRUPTCY ¶ 365.01[1] (15th ed. 1993); *Cheadle v. Appleatchee Riders Ass'n (In re Edward Hill Lovitt)*, 757 F.2d 1035, 1041 (9th Cir. 1985) ("trustee's power to reject those executory contracts which he finds burdensome to the bankrupt's estate is an extension of his power to renounce title to and abandon burdensome property which is already a part of the estate").

Lower courts are also in accord with the principle that rejection through Section 365 is the proper vehicle for abandoning executory contracts. For example, after surveying numerous decisions in multiple jurisdictions throughout the

country, one bankruptcy court concluded that "[t]he weight of authority holds that when a trustee rejects an executory contract or unexpired lease pursuant to section 365(d) of the Code, the bankruptcy estate effectively abandons its interest in it." *In re Kmart Corp.*, 290 B.R. 601, 611 (Bankr. N.D. Ill. 2002) (citations omitted). *See also In re Tama Beef Packing, Inc.*, 277 B.R. 407, 413 (Bankr. N.D. Iowa 2002) (*quoting Orion*); *In re Trans World Airlines, Inc.*, 261 B.R. 103, 117 (Bankr. D. Del. 2001) ("the ability to reject an executory contract is rooted in the principle of maximizing the return to creditors by permitting a debtor in possession to renounce title to and abandon burdensome property if such action is in the best interests of the estate.")

This Court itself has observed that the language of Section 365(a) "by its terms includes all executory contracts except those expressly exempted[.]" *N.L.R.B. v. Bildisco and Bildisco*, 465 U.S. 513, 521 (1984) (rejection of collective bargaining agreement permissible if debtor can show that labor agreement burdens estate). The specific, inclusive treatment of executory contracts under Section 365 rules out the use of Section 554 for abandoning the same contracts.

To support their position that Section 554 of the Code provides an optional method to abandon an executory contract, the Petitioners are left to cite dicta from two lower court decisions. *Petition*, pp. 13-14. Neither case is on point or authoritative.

In one case, *In re Argonaut Fin'l Servs., Inc.*, 164 B.R. 107 (Bankr. N.D. Cal. 1994), certain investors, who were assignees of a creditor to the debtor, Argonaut, claimed they did not receive notice of the debtor's bankruptcy proceeding in time to file an objection to the automatic rejection of a

leasehold interest under Section 365(d)(4) of the Code. The investors had been assigned fractional shares of certain notes and trusts securing the creditor's loan to the debtor. The court held that the debtor's failure to give the assignees notice violated the Due Process Clause, and gave the assignees 60 additional days to file objections to the lease rejection. *Id.* at 115. In dicta, the court suggested that the investors could bring a Section 554 motion to compel abandonment or some other motion. *Id.* at 116. In all events, there was no Section 554 abandonment of an executory contract in that case.

Similarly, in *In re Bernard*, 69 B.R. 13 (Bankr. D. Hawaii 1986), the court found that the rejection of a lease under Section 365(d)(4) cut off the security interest of a mortgagor. *Id.* at 15. The court, again in dicta, suggested that if a mortgagor believed it was denied adequate protection by this outcome, it could file a motion to compel abandonment under Section 554. *Id.* at 15. Again, the court in *Bernard*, like the *Argonaut* court, suggested a form of equitable relief for secured parties based on equating rejection with termination. Since rejection should not result in termination of the security interest, *see In re Austin Development*, 19 F.3d 1077 (5th Cir. 1994), *cert. denied*, 513 U.S. 874 (1994), the courts' suggestions are irrelevant. In sum, the Petitioners have provided no case law supporting their theory that an assumed executory contract can be subsequently abandoned by the bankruptcy estate without a Section 365 rejection.

III. SINCE THE CONTRACT HAD BEEN ASSUMED BY THE DEBTOR-IN-POSSESSION, IT BECAME BINDING ON THE ESTATE AND THUS, THIS IS NOT AN APPROPRIATE CASE TO DECIDE WHETHER A DEBTOR CAN ABANDON AN EXECUTORY CONTRACT WITHOUT REJECTING IT.

Even if this Court decided that the question whether an executory contract can be abandoned through Section 554 is worthy of review, this case is not an appropriate vehicle to consider that question. Here, the trustee had assumed the gas collection contract, and it therefore was already binding on the bankruptcy estate by the time the Petitioners proposed that it be abandoned under Section 554. As the Seventh Circuit observed,

> Resource Technology had a duty to complete the gas-collection system; it had a right to collect the gas only after fulfilling that duty. When the lenders asked the Trustee to "abandon" the contract, Resource Technology had not finished the collection system. Abandonment then would have been nothing but breach; and if Resource Technology repudiated its promise (already broken by delay), it would have lost any right to the gas.

In re Resource Tech. Corp., 430 F.3d 884, 887 (7th Cir. 2005). Petitioners are unable to cite a single bankruptcy decision in any jurisdiction suggesting even in dicta that a bankruptcy trustee can abandon through Section 554 an executory contract after it has been assumed by the estate. Were this

proposition accepted, there would be no risk to a trustee in assuming an executory contract because the estate could then simply abandon it later with impunity.

The trustee had assumed the gas collection agreement. Since that fact figures prominently in the bankruptcy court's decision to reject the Petitioners' alternative settlement offer, the unique facts of this case militate against using this case to review the issue which the Petitioners urge this Court to consider.

IV. PETITIONERS' INTERPRETATION OF THE BANKRUPTCY CODE CREATES A STATUTORY CONFLICT.

Petitioners argue that a trustee has the option of removing an assumed, executory contract from a bankruptcy estate contract either through the assignment and rejection provisions of Section 365 of the Code, or through the abandonment provisions of Section 554. This reading of the Code creates a statutory conflict.

Section 365 provides a comprehensive scheme for a trustee's administration of a special asset class to which the gas collection contract at issue belongs — executory contracts. It attempts to balance the rights of the debtor and non-debtor. *See In re Joshua Slocum Ltd.*, 922 F.2d 1081, 1091 (3rd Cir. 1990) (bankruptcy court must be sensitive to the rights of the non-debtor contracting party and the policy requiring that the non-debtor receive the full value of his bargain). In contrast, Section 554 applies to property of the estate that is either burdensome or of inconsequential value.

Section 554 nowhere mentions contracts, in stark contrast to their comprehensive treatment under Section 365. *N.L.R.B. v. Bildisco and Bildisco*, 465 U.S. 513, 521 (language of Section 365(a) "by its terms includes all executory contracts except those expressly exempted").

Section 365(f)(2) requires that as a condition to assigning an assumed executory contract, the assignee must provide adequate assurance of future performance. Under Section 365(g), the rejection by a trustee of an assumed, executory contract constitutes a breach of contract, with damages flowing from the breach considered first priority administrative expenses. *See* 3 COLLIER ON BANKRUPTCY ¶ 365.09[5], at 365-80 (15th ed. 2005). No similar provisions can be found in Section 554. Therefore, under the Petitioner's theory, if a trustee were to abandon an assumed executory contract under Section 554, the non-debtor party would lose the protections built into Section 365. Specifically, the non-debtor would have no assurance that the recipient of the abandoned contract could actually perform under the contract.

The Petitioners want nothing less than to read Section 365 out of the Bankruptcy Code and allow a trustee to divest the estate of an executory contract by abandoning it like an old refrigerator, where the rights of a third party are not implicated. It is for this reason, as noted above, that courts uniformly hold that a trustee divests the estate of a burdensome contract through the specific provisions of Section 365, not by the general abandonment power under Section 554.

If both Sections 554 and 365 apply to executory contracts, there would be a conflict between them. However, the language and history of Sections 365 and 554 show that

the two provisions are not in conflict: Section 365 applies to executory contracts and unexpired leases; Section 554 applies to other property. A trustee's statutory power to reject executory contracts pre-dated his statutory power to abandon burdensome property. As former Chief Justice Rehnquist observed in his dissenting opinion in *Midlantic Nat. Bank v. New Jersey Dept.*, 474 U.S. 494 (1986),

> Prior to enactment of the Bankruptcy Code in 1978, there was no statutory provision specifically authorizing abandonment in liquidation cases. *By analogy to the trustee's statutory power to reject executory contracts*, courts had developed a rule permitting the trustee to abandon property that was worthless or not expected to sell for a price sufficiently in excess of encumbrances to offset the costs of administration.

Id. at 508 (emphasis added). A similar point is made by a commentator who observes that, "the doctrine of 'abandonment' of assets *other than contracts and leases*, which became statutory only in the Bankruptcy Code evolved in the U.S. from contract and lease cases, not *vice versa*." Michael T. Andrew, *Executory Contracts in Bankruptcy: Understanding "Rejection,"* 59 U. COLO. L. REV. 845, 863 n.80 (1988) (emphasis added).

Section 554 evolved as a mechanism for abandoning assets other than executory contracts and leases, not as an alternative mechanism for abandoning executory contracts and leases. To conclude that Section 554 now applies to executory contracts is to ignore the principle of statutory construction that "[w]here there is no clear intention otherwise, a specific statute will not be controlled or nullified

by a general one, regardless of the priority of enactment." *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974). Moreover, as this Court noted in *Fourco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222 (1957) "[h]owever inclusive may be the general language of a statute, 'it will not be held to apply to a matter specifically dealt with in another part of the same enactment * * * Specific terms prevail over the general in the same or another statute which otherwise might be controlling.'" *Id.* at 228-29 (citations omitted).

V. THE REMAINING ISSUES AND ARGUMENTS RAISED BY PETITIONERS ARE BESIDES THE POINT AND DO NOT MERIT CONSIDERATION.

The Petitioners argue that the Seventh Circuit erred in allegedly holding that Section 363(f) of the Bankruptcy Code does not protect so-called "floating liens." The Petitioners' argument is a *non-sequitor*. Section 363(f) does not apply to this transaction because the bankruptcy trustee was not selling property; he was conceding termination of a contract in connection with the settlement of a dispute. As the Seventh Circuit pointed out, even assuming that Petitioners had a lien on the contract based upon State law, the debtor could equally have entered into an agreement with a contract counter-party to terminate the contract without the consent of its lenders. 430 F.3d at 888. While the lien might have attached to the settlement proceeds, the lenders could not have blocked the settlement or termination of the contract.

The Petitioners assert that the Seventh Circuit held that the Chastang settlement was "made in the ordinary course of business." *Petition*, pp. 9-10. This is an overly imaginative reading of the Seventh Circuit's decision. Nowhere does the

Seventh Circuit state that the Chastang settlement was made in the "ordinary course of business." That is a term of art under Section 363. A bankruptcy trustee is free to conduct affairs in the ordinary course of business; matters outside of the ordinary course require approval of the bankruptcy court. All the Seventh Circuit stated was that a borrower is free to transact business, including settling disputes, without the consent of its lenders. Of course, in bankruptcy, settlements require bankruptcy court approval and the Seventh Circuit never held otherwise.

Petitioners' references to contracts "riding through" bankruptcy are also misplaced and beside the point. Contracts said to "ride through" bankruptcy are not abandoned pursuant to Section 554. More importantly, in this case, the contract had been assumed. Therefore, the entire "riding through" doctrine—dealing with contracts that are neither assumed nor rejected—is simply inapplicable.

CONCLUSION

For all of the foregoing reasons, Respondents respectfully request that this Honorable Court deny the Petition.

Respectfully submitted,

PHILIP L. COMELLA
Counsel of Record
DAVID J. REIER
LAWRENCE P. POSTOL
SEYFARTH SHAW LLP
55 E. Monroe Street, Suite 4200
Chicago, IL 60603
(312) 346-8000

JOHN VAN GESSEL
GROUP GENERAL COUNSEL
WASTE MANAGEMENT
Suite 1600
2859 W. Paces Ferry Road
Atlanta, GA 30339
(770) 805-3350

Attorneys for Respondents
Chastang Landfill, Inc. and
Waste Management Holdings, Inc.

WILLIAM I. KOHN
BENESCH FRIEDLANDER
COPLAN & ARONOFF LLP
2300 BP Tower
200 Public Square
Cleveland, OH 44114
(216)363-4182

Attorneys for Respondent
Consortium Services
Management Group

No. 05-1307

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IN THE

Supreme Court of the United States

BANCO PANAMERICANO, INC., CHIPLEASE, INC., and LEON GREENBLATT,

Petitioners,

v.

CHASTANG LANDFILL, INC., WASTE MANAGEMENT HOLDINGS, INC., CONSORTIUM SERVICE MANAGEMENT GROUP, and JAY A. STEINBERG, CHAPTER 7 TRUSTEE FOR THE ESTATE OF RESOURCE TECHNOLOGY CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF

GREGORY J. JORDAN
Counsel of Record
EVANGELOS J. GEGAS
PETER J. SCHMIDT
DYKEMA GOSSETT PLLC
10 South Wacker Drive
Suite 2300
Chicago, IL 60606
(312) 876-1700

Attorneys for Petitioners

201961

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

STATEMENT PURSUANT TO RULE 29.6

Petitioners' corporate disclosure statement was set forth at page *ii* of the Petition for a Writ of Certiorari, and there are no amendments to that statement.

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INTRODUCTION

Chastang Landfill, Inc., Waste Management Holdings, Inc. and Consortium Services Management Group (collectively, the "Respondents") have filed a Brief in Opposition (the "Response") to the Petition for Certiorari filed by Banco Panamericano, Inc., Chiplease, Inc. and Leon Greenblatt (collectively, the "Petitioners"). In the Response the Respondents misstate the holdings of the federal courts on the issue on abandonment v. assumption or rejection of contracts under the Bankruptcy Code. Respondents raise a red herring regarding the prior assumption by the Chapter 11 Trustee for the Estate of Resource Technology Corporation (the "Trustee") of the executory contract at issue. The Respondents fail to address Petitioners' argument regarding the sale of the debtor's assets under Section 363 of the Bankruptcy Code (11 U.S.C. § 363), and misread the opinion of the Seventh Circuit below.

The Section 363(f) "Floating Lien" Issue Is Appropriate For Review

Contrary to the Respondents' assertion, the argument regarding the Seventh Circuits finding on the Section 363(f) issue is not a *non-sequitor*. Section 363(f) applies to the underlying transaction. The Respondents argue that Section 363(f) does not apply because the Trustee was not selling property, but rather was "conceding termination of a contract on connection with the settlement of a dispute. However, settlement of a claim that is property of the estate will constitute a sale of such property under Section 363(f). *Northview Motors, Inc. v. Chrysler Motors Corporation*, 186 F.3d 346 (3d Cir. 1999). Contracts are included as property of the estate under § 541. *In re Rickel Home Centers, Inc.*, 209 F.3d 291 (3d Cir. 2000). Therefore, the Trustee's

settlement with Chastang, which included the termination of the gas rights agreement, necessarily implicates Section 363(f).

The focus of the Petition regarding the Section 363(f) issue was on the 7th Circuit's determination that the Petitioners held a floating lien on all the assets of the Debtor, and that such a lien is not entitled to the protections of Section 363(f) of the Code. As noted in the Petition, Section 363(f)(3) bars a creditor from selling assets outside the ordinary course of business, if the sale will not generate funds sufficient to satisfy all liens against the property. The Court of Appeals ruled that Section 363(f)(3) only applies to liens on specific assets. Liens on all of a debtor's assets, such as that held by the Petitioners, which the Court of Appeals termed a "floating lien," are not entitled to the protections of Section 363(f)(3), according to the Court of Appeals. The 7th Circuit's interpretation of Section 363(f)(3) severely restricts the protections of that section, to the great detriment of those persons and entities willing to lend to distressed or bankrupt companies, is antithetical to the concept of secured transactions and the Code's respect for the bargained for protections of secured creditors, and conflicts with the unambiguous language of Section 363(f)(3). Respondents do not address these issues. Its application will effect billions of dollars in bankruptcy cases.

Respondents' Citations and Argument on the Question of Abandonment Are Off the Mark

Respondents misstates precedent when they claim that the federal courts "agree that rejection under Section 365, not abandonment under Section 554, provides the mechanism for removing burdensome executory contracts from an estate." (Response, p. 4.) The cases cited by the Respondents

do not involve questions of rejection of executory contracts as opposed to abandonment of such contracts. Those cases simply involve assumption or rejection of executory contracts under Section 365. None of the cases cited by Respondents address the legal question at issue in this case. The Petitioners are not claiming that contracts cannot be handled through 365. Petitioners are only stating that contracts can be handled through Section 365 or Section 554 of the Bankruptcy Code (11 U.S.C. § 554). Section 365 grants bankruptcy trustees the power to assume or reject executory contracts, but in addition a trustee has the power of abandonment under Section 554.

Respondents focus on language in the cited cases that indicates that the power to assume or reject under Section 365 is "based on" or an "extension of" a trustee's power to abandon burdensome property. This language in no manner resolves the question presented herein. If anything, it supports Petitioners. It indicates that the procedures available to a trustee under Section 365 are in addition to those provided under the broad, expansive language of Section 554 and Section 541 of the Bankruptcy Code (11 U.S.C. § 541). In situations where a trustee is faced with a burdensome contract and no other means of disposing of it, the trustee can reject under Section 365. In situations, such as that presented in the present case, where a secured creditor is willing to pay into the bankruptcy estate an amount sufficient to make abandonment more attractive than rejection, the trustee can abandon under Section 554. Section 554 is an alternate means of dealing with contracts that may be burdensome to the estate.

Respondents fail to distinguish the case law relied upon by the Petitioners. *In re Argonaut Financial Services, Inc.*, 164 B.R. 107 (N.D. Cal. 1994) and *In re Bernard*, 69 B.R. 13 (Bankr. D. Haw. 1986) both support the Petitioners'

interpretation of Section 554. The Respondents attempt to distinguish these cases on the assertion that the courts' comments were "based on equating rejection with termination." Only the *Bernard* opinion made that comparison, and in neither case was that relevant to the courts' statements that abandonment under Section 554 is available for contracts.

Petitioners raised the point that contracts that are neither assumed nor rejected "ride-through" the bankruptcy, either vesting in the reorganized debtor in case of a successful reorganization, or in the pre-petition debtor. The Respondents argue that such a ride-through is not an abandonment under Section 554. However, under Section 554(c), any property not administered at the closing of a case is abandoned to the debtor. Therefore, the ride-through does constitute an abandonment. The key point in this discussion is that contracts can be abandoned, through failure to assume or reject, and so Section 365 is not the exclusive means for a trustee to deal with a contract.

The Assumption of the Chastang Contract Does Not Alter the Analysis

The Respondents raise a red herring in their brief: that the assumption of the Chastang contract, prior to the settlement with the Trustee, makes review by this Court inappropriate. In fact, this point benefits Petitioners' cause. The Respondents claim the assumed nature of the contract weighs against granting certiorari, but provide no basis. The Respondents cite to the 7th Circuit's opinion out of context. The 7th Circuit was stating that abandonment would been a breach and would have led to a loss of any right the debtor would have had to the gas. While the 7th Circuit seemed to

misunderstand the nature of abandonment under Section 554 (equating it with repudiation under non-bankruptcy law), the important fact is that if the contract were abandoned under Section 554, it would pass to the pre-petition debtor, and would still have been subject to the Petitioners' security interests, regardless of any issues of breach.

Respondents have cited to *Cheadle v. Appleatchee Riders Assn. (In re Edward Hill Lovitt)*, 757 F.2d 1035 (9th Cir. 1985). In that case, the court noted that because executory contracts and leases involve future liabilities as well as rights, an affirmative act of assumption is required of the trustee to bring the property into the estate. If anything, then, the fact that the Chastang contract had been assumed strengthens the argument that the contract was property of the estate and subject to abandonment under Section 554. The trustee took the affirmative act of assuming the Chastang contract, bringing the contract into the estate as property of the debtor, and the Trustee therefore had the right to abandon that asset. The Trustee advised the Bankruptcy Court of his preference for the Petitioners' settlement offer. Despite the Trustee's determination that the best interests of the estate lie with abandonment of the contract, the Bankruptcy Court's misreading of Section 554 forced the Trustee to settle with the Respondents on less favorable terms.

There Is No Conflict Between Section 554 and Section 365 Under Petitioners' Reading

Respondents claim that Petitioners' reading of the Code would create a statutory conflict between Section 365 and Section 554. Respondents claim that Section 554 makes no mention of contracts, while Section 365 expressly deals with contracts, and that the specific language of Section 365 regarding contracts overrules the general language of Section 554.

First, there is no conflict between the two because they are not mutually exclusive. Section 365 provides a means to assume or reject an executory contract. Section 554 provides a means for a bankruptcy estate to disclaim ownership in a burdensome contract and thereby transfer the rights back to the pre-petition debtor. Moreover, as noted in the Petition, the Seventh Circuit did not focus on the alleged conflict between Section 554 and Section 365; rather, it found that 1) while a contract right might be property of the estate, performance obligations under a contract are not property of the estate, and 2) if the contract right was abandoned, it would disappear, along with the Petitioners' security interest. The Seventh Circuit stated "[a] right that is abandoned is gone. Once [the Debtor's] right to harvest gas disappears, the entitlement reverts to the landfill's owner—Chastang."[1]

Respondents have cited to the dissent in *Midlantic National Bank v. New Jersey Dept.*, 474 U.S. 494 (1986), for the fact that prior to 1978, abandonment was not a statutory provision, unlike the assumption and rejection provisions of Section 365. Therefore, it is logical to assume that if Congress created a new statutory provision that could potentially conflict with an existing one, Congress would have put in language excluding contracts from Section 554. The dissent in *Midlantic* states that there is no limitation on the power of abandonment under Section 554, and that Congress could have exempted certain situations (such as environmentally harmful property in the Midlantic case) if it wished to remove such situations from the application of the statute.

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1. Actually, the Seventh Circuit misstates the effect of abandonment. The effect is that it vests the interest in the pre-petition debtor or in the reorganized debtor.

The Petitioners' interpretation is supported by the express language of the Code. Section 554 states broadly that "any property of the estate" may be abandoned. Section 541 uses expansive language to include broad scope of assets within property of the estate. Section 541 expressly excludes from estate property any interest of the debtor in a lease of non-residential real property that terminated pre-petition. Congress knew how to limit the definition of property of the estate as regards contracts. The inclusion of contracts into property of the estate and the language of Section 554 that "any property of the estate" can be abandoned leaves only the conclusion that contracts are subject to abandonment under Section 554.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

GREGORY J. JORDAN
Counsel of Record
EVANGELOS J. GEGAS
PETER J. SCHMIDT
DYKEMA GOSSETT PLLC
10 South Wacker Drive
Suite 2300
Chicago, IL 60606
(312) 876-1700

Attorneys for Petitioners